

1 BEFORE THE POLLUTION CONTROL HEARINGS BOARD
2 STATE OF WASHINGTON

AIR QUALITY SERVICES,)	
)	
Appellant,)	PCHB No. 89-75
)	
v.)	FINAL FINDINGS OF FACT,
)	CONCLUSIONS OF LAW
STATE OF WASHINGTON, DEPARTMENT)	AND ORDER
OF ECOLOGY,)	
)	
Respondent.)	

9 This matter, the appeal of a civil penalty for alleged violation
10 of asbestos removal regulations, came on for hearing before the
11 Pollution Control Hearings Board, Wick Dufford, presiding, on
12 August 28, 1989, in Wenatchee, Washington. Board member Harold S.
13 Zimmerman has reviewed the record.

14 Appellant Air Quality Services was represented by Bernard Heavey,
15 Attorney at Law. Respondent Department of Ecology was represented by
16 Douglas Mosich, Assistant Attorney General. The proceedings were
17 recorded by Deanna P. Baker, of Affiliated Court Reporters, Wenatchee.
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1 Witnesses were sworn and testified. Exhibits were admitted and
2 examined. From the testimony heard and exhibits examined, the Board
3 enters the following

4 FINDINGS OF FACT

5 I

6 Air Quality Services (AQS) is a contractor located in Omak,
7 Washington, which performs asbestos abatement services.

8 II

9 The Washington State Department of Ecology is a state agency with
10 authority for direct enforcement of a program of air pollution
11 prevention and control in certain parts of the state, including Adams
12 County.

13 III

14 AQS contracted to remove asbestos insulation from Lind High
15 School in the town of Lind, Adams County, Washington. Notices of
16 Intent to Remove or Encapsulate asbestos were filed with Ecology,
17 setting April 1, 1989, as the project starting date and April 7, 1989,
18 as the completion date. The notification estimated removal of 1,200
19 linear feet of asbestos material on pipes and 500 square feet of
20 asbestos material on other facility components.

21 IV

22 The job included removal of some, but not all, of the asbestos
23 material in the high school's boiler room.
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26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW AND ORDER

1 Another firm, S & L Environmental, was employed to design the
2 project and to monitor its performance. According to S & L's engineer,

3 The intent of the project was not to make the boiler room
4 "asbestos free" but to remove selected asbestos containing
5 materials on those fixed facility components that were
6 frequently accessed to ease maintenance procedures for
7 school maintenance employees.

8 . . . Selected pipes and boiler insulation were to be
9 removed wet in a negative air enclosure and any remaining
10 asbestos containing material was to be locked down with
11 Fiber Seal encapsulant.

12 V

13 AQS performed the work under the contract between April 1 and
14 April 8, 1989. A negative air enclosure was constructed in the boiler
15 room and wet removal methods were used.

16 Air monitoring performed in the boiler room on April 6 showed a
17 fiber count of .002 fibers per cubic centimeter of air, a de minimus
18 level just at the detection limit for the phase contrast microscopy
19 (PCM) test.

20 After the asbestos removal was complete, S & L's engineer
21 inspected the boiler room and found no traces of visible asbestos
22 containing material on any surfaces where removal had been called
23 for. On April 8, 1989, AQS workers applied over seven and one-half
24 gallons of fiber seal encapsulant to the boiler and related pipes in
25 the boiler room. Thereafter, AQS departed the job site.

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW AND ORDER

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VI

On April 10, 1989, the crew of another contractor went to work in the boiler room to carry out reinsulation. Subsequent site inspection revealed that these reinsulators had climbed on fixed piping and the boilers, breaking at least one pipe and a safety relief valve. The reinsulation crew left behind debris which was not present when the AQS workers left the site.

VII

On April 12, 1989, the third day after the reinsulators began work, an Ecology inspector conducted a follow-up inspection of the AQS removal job. This inspector had been to the site earlier on April 5 to observe the AQS set-up, but had not visited the boiler room on that occasion.

On the April 12 visit, Ecology's inspector discovered a fragment of material, about the size of a pencil eraser, on the back of a pipe near an air compressor adjacent to the boiler. This fragment was removed from the pipe and sent to Ecology's laboratory for analysis. The analysis showed it to be approximately 65% amosite asbestos.

The inspector observed that the fragment looked to be dry. It did not appear to be covered with encapsulant. He did not attempt to determine if hand pressure would crumble, pulverize or reduce the fragment to powder -- possibly because the sample was so small. By its appearance, however, he judged that the asbestos was friable.

VIII

On April 20, 1989, Ecology issued a civil penalty notice to AQS assessing a fine of \$500 for alleged violation of asbestos removal regulations. Thereafter on May 1, 1989, AQS had pictures taken in the boiler room, and caused further air monitoring to be done. The results showed a fiber count of .0023 fibers per cubic centimeter of air by PCM. No asbestos was found in a sample subjected to transmission electron microscopy, which unlike PCM, can distinguish between asbestos and non-asbestos fibers.

IX

On May 22, 1989, Ecology affirmed the penalty and, on June 20, 1989, AQS appealed to the Pollution Control Hearings Board. The matter became PCHB No. 89-75. Subsequently, on August 28, 1989, Ecology issued an amended Notice of Penalty Incurred and Due (No. DE 89-E140). By that document the penalty was based on two alleged violations of federal regulations incorporated into the Washington Administrative Code through WAC 173-400-075.

The two asserted violations were identified as follows:

Specifically, Title 40, Code of Federal Regulations, Part 61.147(e)(1), requires that friable asbestos materials that have been removed or stripped remain adequately wet until they are collected for disposal. Friable asbestos containing material which had been removed or stripped was found which did not remain adequately wet prior to disposal. Furthermore, Title 40, Code of Federal Regulations, Part 61.152(b)(1)(iii) requires that asbestos containing materials be disposed of by sealing, after wetting and while wet, in leak-tight containers. Asbestos

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1 containing material was found which did not remain
2 adequately wet prior to disposal nor was it sealed in
3 leak-tight containers.

4 X

5 On the evidence presented, two hypotheses emerge as to the source
6 of the fragment of asbestos found by Ecology's inspector. Either the
7 fragment, having been removed elsewhere, was somehow carried to the
8 pipe and stuck there, or it was never removed from the pipe in the
9 first place.

10 If the fragment came from elsewhere, we are not persuaded that
11 the preponderance of evidence points toward AQS as responsible. The
12 intervening presence of the reinsulators, whose work habits were
13 somewhat sloppy, prevents such an inference.

14 XI

15 Any Conclusion of Law which is deemed a Finding of Fact is
16 hereby; adopted as such.

17 From these Findings of Fact, the Board comes to the following

18 CONCLUSIONS OF LAW

19 I

20 The Board has jurisdiction over the parties and the subject
21 matter. Chapters 43.21B and 70.94 RCW.

22 Appellant argues that the Washington Clean Air Act, Chapter 70.94
23 RCW, does not confer authority upon State air pollution control
24 officials to enforce work practices relating to the removal of
25

26 FINAL FINDINGS OF FACT,
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1 asbestos in indoor spaces. We rejected this argument in Interstate
2 Industrial Mechanical, Inc. v. PSAPCA, PCHB No. 88-147 (May 30, 1988),
3 (Order Denying Motion to Dismiss) and adhere to our ruling in that
4 case.

5 II

6 Ecology's asbestos regulations (WAC 173-400-075) adopt by
7 reference the asbestos regulations of the United States Environmental
8 Protection Agency, promulgated as part of the National Emissions
9 Standards for Hazardous Air Pollutants (NESHAPS) in 40 CFR Part 61.

10 The following definitions are contained at 40 CFR 61.141:

11 "Friable asbestos material" means any material
12 containing more than 1 percent asbestos by weight
13 that hand pressure can crumble, pulverize or reduce
to powder when dry.

14 "Remove" means to take out friable asbestos materials
from any facility.

15 "Strip" means to take off friable absestos materials
16 from any part of facility.

17 III

18 The penalty stems from the alleged violation of 40 CFR
19 61.147(e)(1) and 40 CFR 61.152(b)(1)(iii) which read, respectively:

20 Each owner or operator to whom this section applies shall
21 comply with the following procedures to prevent emissions
of particulate asbestos material to the outside air: . . .

22 (e) For friable asbestos materials that have been
removed or stripped:

23 (1) Adequately wet the materials to ensure that they
24 remain wet until they are collected for disposal in
accordance with Section 61.152 . . .

25
6 FINAL FINDINGS OF FACT,
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(7)

1 Each owner or operator . . . shall: . . .
2 (b) Discharge no visible emissions to the outside air
3 during the collection, processing [including
4 incineration], packaging, transporting, or deposition
5 of any asbestos-containing waste material generated by
6 the source, or use one of the disposal methods
specified . . . as follows: . . .
(iii) After wetting, seal all asbestos-containing
waste material in leak-tight containers while
wet . . .

7 IV

8 If the fragment was transported from somewhere else to the place
9 where Ecology's inspector found it, the penalty should be reversed
10 because AQS was not shown to be responsible for putting it there.

11 V

12 If the fragment was never removed from the pipe in the first
13 place, the penalty should be reversed because neither 40 CFR
14 61.147(e)(1), nor 40 CFR 61.152(b)(1)(iii) apply. The former refers
15 to friable as asbestos materials that have been removed or stripped.
16 The latter applies even later in the process when the removed and
17 stripped materials are being disposed of as waste.

18 The violations charged do not refer to the use or non-use of
19 encapsulant. Thus, if this asbestos was left on the pipe, it is no
20 different from the rest of the asbestos insulation in the boiler room
21 which was not stripped or removed by AQS.

22 VI

23 Since we conclude as we do, it is not necessary to decide whether
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1 the evidence was sufficient to show that the asbestos was "friable".
2 The notification requirements apply only to demolition or renovation
3 involving "friable asbestos" (40 CFR 61.145 and 61.146) and, perhaps
4 an inference regarding the character of the asbestos can be made from
5 the filing here of Notices of Intent to Remove or Encapsulate Asbestos.

6 However, we note that the federal regulations which Ecology is
7 enforcing are less stringent than the local regulations of the Puget
8 Sound Air Pollution Control Agency (PSAPCA) on this point. Under
9 PSAPCA's rules the agency must only show that the sample contained
10 more than 1% asbestos. PSAPCA Regulation I, Section 10.02(e). The
11 burden then shifts to the appellant to show the material was not
12 friable. Savage Enterprises v. PSAPCA, PCHB No. 86-101 (1987). Under
13 the federal definition, however, we believe it is incumbent upon the
14 regulatory agency to show that the material sampled was friable.

15 VII

16 Any Finding of Fact which is deemed a Conclusion of Law is hereby
17 adopted as such.

18 From these Conclusions of Law, the Pollution Control Hearings
19 Board enters the following
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26 FINAL FINDINGS OF FACT,
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ORDER

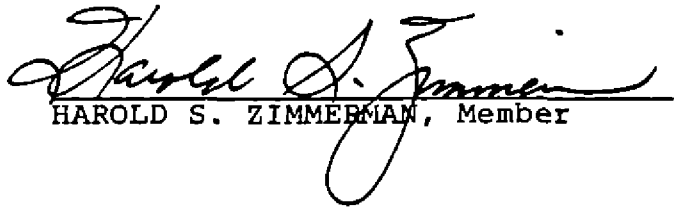
Notice of Penalty Incurred and Due, No. DE 89-E140, is REVERSED.

DONE this 5th day of October, 1989.

POLLUTION CONTROL HEARINGS BOARD



WICK DUFFORD, Presiding Officer



HAROLD S. ZIMMERMAN, Member

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